No. 84-302 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

MOTION REQUESTING THAT THE COURT DEFER CONSIDERATION OF THE PETITION AND REQUEST THAT THE UNITED STATES RESPOND TO THE PETITION

LODGING

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No. 84-302

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INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

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MOTION REQUESTING THAT THE COURT DEFER CONSIDERATION OF THE PETITION AND REQUEST THAT THE UNITED STATES RESPOND TO THE PETITION

Petitioner United States District Judge Alcee L. Hastings requests that the Court:

1. Defer action on his Petition for Writ of Certiorari (the "Petition") until the Court has received and reviewed

the record on which the decision below was based;[1]

2. Request that the Solicitor General file a response to the Petition setting forth the position of the United States and its Department of Justice; and

3. Either defer action on the Petition or, if the Petition is granted, defer briefing on the merits until the United States Court of Appeals has heard and decided a related case, The Honorable Alcee L. Hastings, United States District Judge v. Judicial Conference of the United States, et al., No. 84-5576 (D.C. Cir. docketed Aug. 24, 1984).

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1. By letter dated October 4, 1984, counsel for petitioner requested that the Clerk of the United States Court of Appeals for the Eleventh Circuit certify and transmit the record to this Court as soon as feasible and asked the Clerk of this Court to inform the Court that such a request had been made pursuant to Rule 19.1 of this Court's Rules. A copy of that letter is included in the Appendix to Motion, infra.

STATEMENT OF THE CASE

1. The Nature of the Action

Petitioner is a United States district judge. His conduct was investigated by a federal grand jury. The grand jury returned an indictment charging that petitioner had conspired to corrupt and obstruct justice. Petitioner was tried and acquitted. Shortly thereafter, two members of the judicial council of the circuit in which petitioner serves filed a complaint under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982). The complaint realleged the charges on which petitioner had been tried and acquitted and asked the judicial council to reinvestigate the charges and recommend that petitioner be impeached by the House of Representatives.

The Respondent Investigating Committee (the "Committee") was appointed to investigate the allegations in the complaint. As one of the first steps in its investigation, the Committee filed a petition asking the district court to permit the Committee's representatives to inspect and copy all records of the grand jury that had indicted petitioner. The Justice Department supported the petition; petitioner here opposed it. The other judges serving in petitioner's district disqualified themselves, and a judge from outside the circuit was designated to preside.

The district court determined that it would be inappropriate for the court to examine any of the requested grand jury materials prior to disclosure to determine which, if any, were relevant and necessary to the Committee's investigation or to

resolve the factual issues raised by petitioner's affirmative defenses. After considering briefs and hearing oral argument, the district court entered an order directing the United States Attorney for the district to "procure and disclose to the Special Committee [respondent here] and its two designated counsel all records, transcripts, minutes, and exhibits of Grand Jury 81-1-GJ (MIA)" (App. 99-100; emphasis supplied). The court imposed restrictions on the time, place, and manner in which the inspection and any copying were to be done (App. 100-05). The court did not, however, restrict or limit in any way the records to which the Committee was to have access (id.). After hearing the appeal, a panel of specially designated judges affirmed the district court's order (App. 1-57).

2. Facts and Proceedings Relevant to this Motion.

a. The court of appeals denied the petition for rehearing on August 3, 1984 (App. 106-07). Petitioner here promptly asked that court to stay its mandate to permit him to seek review in this Court. As required by local rule,[2] that motion identified substantial questions that he intended to present to this Court. The respondent Committee filed a brief in opposition to that motion. The court of appeals, by the presiding member of the special panel and author of the opinion below, granted the motion on August 13th (App. 108-09).

In accord with the condition imposed by that order, counsel for petitioner filed the Petition on August 25, 1984.

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2. Rule 27 of the Rules of the United States Court of Appeals for the Eleventh Circuit.

On August 30th, the Committee filed an Application for Order Vacating Stay addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. The Committee acknowledged that the decision below presented a question of first impression concerning proceedings of vital importance to the Judiciary. The Committee simply alleged that the Court was unlikely to grant review or to reverse the decision below and urged that the stay be vacated. Justice Powell promptly denied the Application. Investigating Committee of the Judicial Council of the Eleventh Circuit v. The Honorable Alcee L. Hastings, No. A-144 (84-302)(Sept. 6, 1984). Five days later, the Solicitor General advised the Court that the United States did not intend to file a response to the Petition "unless requested to do so by the Court."

b. On October 2, 1984, petitioner received the forty-eight (48) page Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief"). In the Brief, counsel for the Committee alleged that two of the four Questions Presented in the Petition "are not fairly raised by the record" (Brief at i-ii). Throughout the Brief, counsel for the Committee also suggested that petitioner had taken positions in the Petition inconsistent with the arguments he had made in the courts below (e.g., Brief at 35-36, 40-42, 45).

The Committee's Brief has created serious factual questions and has called counsels' integrity as members of the Bar of this Court into question. Accordingly, counsel for petitioner promptly invoked Rule 19.1 of the Rules of this Court and

requested that the clerk of the court of appeals certify and transmit to the Court the record upon which the courts below based their decisions in order that this Court would have that record available to it before it acted upon the Petition (App. to Mot., infra).

c. In December, 1983, Petitioner here filed a complaint in the United States District Court for the District of Columbia challenging the constitutionality of the Act on its face and as it had been applied in proceedings against him. The Honorable Alcee L. Hastings v. Judicial Conference of the United States, et al., No. 83-3850 (slip op. July 25, 1984). The members of the respondent Committee are defendants in that action. On July 25th, the district court entered a decision holding the Act facially valid and finding that the federal courts were precluded

from considering petitioner's other claims (id.).

Judge Hastings duly noted his appeal. The Honorable Alcee L. Hastings v. Judicial Conference of the United States, et al., No. 84-5776 (D.C. Cir. appeal docketed Aug. 24, 1984). That court has now established a briefing schedule and instructed its clerk to include the case in the pool of cases that are available for selection on its February, 1985 calendar. (A copy of that court's order is included in the Appendix to this Motion.)

REASONS WHY THE MOTION SHOULD BE GRANTED

1. The Court Should Defer Consideration Of The Petition Until The Record Is Available For Its Review.

In its Brief, counsel for the Committee alleges that two of petitioner's four Questions Presented "are not fairly raised

by the record" (Brief at i-ii) and suggests throughout that counsel for petitioner has been less than candid with the Court (e.g., Brief at 35-36, 40-42, 45). In Petitioner's Reply to the Brief (the "Reply"), counsel for petitioner will respond with appropriate citation to the record below.[3] Nonetheless, the pleadings before this Court raise serious factual questions. In fairness the Court should not have to resolve these questions based solely upon the assertions of counsel for the parties.

This Court's Rule 19.1 permits any party to request that the record be certified and transmitted to the Court at any time prior to action on a petition for writ of certiorari. Counsel for peti-

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3. Counsel has prepared Petitioner's Reply to the Brief. It will be filed with this motion if the printing can be completed. Otherwise, it will be filed as soon thereafter as possible.

tioner submits this is one of those fortunately rare instances when the record may properly be deemed essential to enable the Court to verify the assertions in the Petition and the Reply and to resolve the factual questions raised by the Brief. To make this procedure meaningful, the Court should defer action on the Petition until the record has been received and made available to the Court.

2. The Court Should Request That The Solicitor General File A Response To The Petition And Should Defer Action Until That Response Has Been Received.

Attorneys in the Criminal Division of the United States Department of Justice (and prosecuting attorneys in the offices of the various United States Attorneys) occupy a special position with respect to grand jury materials. The grand jury provides these attorneys with powerful tools to assist them in executing their

responsibilities in investigating and preparing cases for prosecution under the criminal laws of the United States. Once the investigative and prosecutorial functions have been completed, however, those same attorneys retain a custodial responsibility as officers of the district court under whose auspices the grand jury was convened. They assume a fiduciary duty to assure that the courts with ultimate responsibility for maintaining the integrity of the grand jury are fully and properly informed in cases in which a stranger to the grand jury seeks access to the products of its work for use in civil proceedings.

In the present case, the prosecuting attorneys publicly asserted that the grand jury records included some materials relevant to the Committee's investigation, but supported the Committee's position

that independent examination by the district court to verify this assertion or to limit disclosure to the specific materials found relevant was inappropriate. Those same attorneys reported that the Criminal Division's Public Integrity Section has used federal grand juries to investigate other federal judges. They urged the court of appeals to uphold the district court's construction of the Act to assure that they would be able to disclose the products of grand jury investigations into the conduct of other federal judges to the appropriate circuit judicial council or special committee appointed pursuant to the Act.

This Court has recently reiterated its concern that disclosure of grand jury material for non-criminal use presents the potential for encouraging prosecutorial misuse of the grand jury's powers.

United States v. Sells Engineering, Inc., 103 S.Ct. 3133, 3142-43 (1983). Given that concern, the sensitive issues surrounding the Executive's use of the grand jury to investigate the conduct of the very judges before whom it appears, and the total disclosure the Justice Department urged in the courts below, the Solicitor General's decision not to respond is startling. By its Brief, the Committee suggested that petitioner may have mischaracterized the Justice Department's position and the potential consequences of the court of appeals's decision on the Public Integrity Section's investigation of sitting federal judges. In those circumstances, petitioner submits that this Court should not act upon the Petition without first requesting and receiving a full statement of the position of the United States Department of Justice.

3. The Court Should Either Defer Action On The Petition Or Grant The Petition And Defer Briefing On The Merits Until The United States Court of Appeals For The District of Columbia Circuit Has Heard And Decided Judge Hastings's Challenge To The Constitutionality Of The Act.

a. In the courts below, Judge Hastings urged that the doctrine of constitutional avoidance compelled a construction of the Act that should have resulted in the Committee's petition being dismissed or denied. The third Question Presented in the Petition (Petition at ii) brings that issue before this Court. For reasons articulated more fully in petitioner's Reply, petitioner submits that the Committee's attempt to characterize that issue as a challenge to the Act's constitutionality is disingenuous at best.

In a separate action, to which the members of the Committee are party and in which they are represented by the same

counsel, Judge Hastings directly challenged the constitutionality of the Act on its face and as it had been construed and applied in proceedings against him, including the construction initially given by the district court and later affirmed by the court of appeals in the proceedings seeking disclosure of grand jury material. The district court in the related action rejected the challenge to the Act's facial validity and ruled that the Act precluded the court from exercising jurisdiction to consider any claim that it was being construed and applied in an unconstitutional manner. Hastings v. Judicial Conference of the United States, No. 83-3850 (D.D.C. July 25, 1984) (slip. op.), appeal pending, No. 84-5576 (D.C. Cir.).

Petitioner's appeal from that decision is now pending before the Court of

Appeals for the District of Columbia Circuit. That court has established a briefing schedule and has instructed its clerk to place the case in the pool available for selection in Feburary, 1985 (App. to Mot., infra). It is reasonable to assume that that court will decide the case promptly and that any party aggrieved by that decision will seek to have it reviewed in this Court.[4]

b. The importance to the federal judiciary of the underlying questions and the efficient allocation of judicial resources suggest that the questions that will be presented by any appeal or petition seeking review in Hastings v. Judicial Conference should also be before this Court as it considers the Questions Presented by the Petition here. In both

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4. Indeed, a decision by this Court to defer action in this case may well expedite a decision by the court of appeals.

cases, all parties have acknowledged that the Act is a substantial political innovation that will have a far reaching and substantial impact on the federal judiciary. Whether it is constitutional and, if so, how it should be construed and implemented are critical questions that will affect the operations of all three branches of government.

Logically, the underlying questions concerning the facial validity of the Act and the manner in which it has been construed and applied in proceedings against petitioner here should be addressed by this Court with the Questions Presented here. If the Act survives such an examination, the specific questions concerning its proper construction and implementation in relation to the Executive's use of grand juries to investigate federal judges could be considered and

resolved against that background. If either the Act or the proceedings against Judge Hastings were found to be unconstitutional, a decision in this case would be unnecessary.

c. The delay that would result if this Court deferred action in this case would not significantly affect the implementation of the Act or the administration of the business of the courts in the Eleventh Circuit. The complaint that the Committee is investigating alleges that Judge Hastings committed a high crime in office. Only the House of Representatives may initiate proceedings to effectively sanction that conduct, and that body need neither await nor defer to any investigations or recommendations from administrative bodies of the Judiciary. Moreover, given the notoriety that has attended the prosecution, trial, and subsequent pro-

ceedings against Judge Hastings, it is difficult to perceive how any decision that the Judicial Council of the Eleventh Circuit might make could meaningfully alter the public perceptions of the controversy and its participants or affect the business of the courts in that circuit.

In short, there are sound and substantial reasons why the Court should defer action in this case until the related case is also before it. The reasons for early action, on the other hand, are few and relatively unsubstantial.

CONCLUSION

This nation has enjoyed the benefits of an independent federal court system for almost 200 years. That system has depended in significant measure upon the judicial individualism promoted by the

constitutional protections afforded the individual judge and by the historic self-discipline of the courts in refraining from assuming unnecessary non-judicial powers and functions. It may be that a substantial change is necessary, but that determination is of sufficient importance that it should not be rushed, certainly when there is no apparent need for haste.

Accordingly, Petitioner United States District Judge Alcee L. Hastings requests that the Court:

1. Defer action on the Petition until the Court has received and reviewed the record on which the decision below was based;

2. Request that the Solicitor General file a response to the Petition setting forth the position of the United States and its Department of Justice; and

3. Either defer action on the

Petition or, if the Petition is granted, defer briefing on the merits until the United States Court of Appeals has heard and decided The Honorable Alcee L. Hastings, United States District Judge v. Judicial Conference of the United States, et al.

Respectfully submitted,

Terence J. Anderson
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(305) 284-2971

Counsel of record for the
Honorable Alcee L. Hastings,
petitioner.

APPENDIX TO MOTION

October 4, 1984

Express Mail

Spencer D. Mercer, Clerk
United States Court of Appeals
for the Eleventh Circuit
United States Court of Appeals
Courthouse
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Hastings v. Investigating Committee, No. 84-302 (U.S.): Request that Record in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir.), be Certified and Transmitted to the Supreme Court of the United States Pursuant to that Court's Rule 19.1.

Dear Mr. Mercer:

On August 25, 1984, I filed a Petition for Writ of Certiorari (the "Petition") on behalf of the Honorable Alcee L. Hastings asking the Supreme Court of the United States to review the decision of the Court of Appeals in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003 (11th Cir.). The Petition was docketed in the Supreme

Court as Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, No. 84-302 (U.S.).

On October 2, 1984, I received a copy of the Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari (the "Brief"). In that Brief, counsel for the Committee asserts that two of the four Questions Presented in the Petition "are not fairly raised by the record" [Brief, pp. (i)-(ii)]. That assertion calls into question my integrity as a member of the Bar of the Supreme Court. Moreover by that assertion and throughout the Brief, the Committee implies that counsel for petitioner has been less than candid with the court and may have misstated the case below. Petitioner believes and will suggest in his Reply that the Committee seriously

misread the Questions Presented in the Petition and that its Statement of the Case and Argument based upon that misreading are misleading.

The Committee's Brief has created a serious factual question that the Supreme Court can only resolve by a direct examination of the record that the Court of Appeals had before it when it decided the case. For that reason as counsel to petitioner, I now deem it essential that the Supreme Court have the complete record before it prior to the time that it acts upon the Petition.

The mandate of the Court of Appeals has been stayed pending disposition of the Petition, and I am advised that the Court of Appeals remains in possession of the record. Accordingly, as counsel for the Honorable Alcee L. Hastings, petitioner, and pursuant to Rule 19.1 of the Rules of

the Supreme Court of the United States, I hereby request that you certify the record in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003, including both the record on appeal as transmitted to the Court of Appeals by the United States District for the Southern District of Florida and the record made in the Court of Appeals by the parties' briefs and that court's orders, and that you transmit this record to the Supreme Court of the United States. Because the Committee's Brief has been filed and the Solicitor General has advised the Supreme Court that the United States does not intend to respond, I would ask that you certify and transmit this record at the earliest possible date.

By copy of this letter, I am asking the Clerk of the Supreme Court to inform the Court that petitioner has requested

that the record be made available to the Court before action is taken on the Petition. I am also sending a copy of this request to John Doar, Esq., counsel of record for the Committee, and to the Honorable Rex E. Lee, Solicitor General and counsel of record for the other respondent, the United States of America.

Sincerely,

Terence J. Anderson
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, Florida 33124
Counsel for the record for the
Honorable Alcee L. Hastings.

copies to:

Alexander Stevas, Clerk
Supreme Court of the United States

John Doar, Esq.

The Honorable Rex E. Lee
Solicitor General of United States

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 84-5576

September Term, 1984
DC Civil No. 83-03850
DC Crim. NO. _____

Honorable Alcee L.Hastings,
U.S. District Judge,
Appellant

v.

Judicial Conference of the
United States, et al.

O R D E R

This matter having been docketed on August 24, 1984 and the docketing statement having been filed, it is

ORDERED that a briefing schedule is set as follows:

Appellant(s) brief and appendix (or record excerpts or General Rule 17(c) transcripts) November 13, 1984,

Appellee(s) brief December 13, 1984,

Appellant(s) reply brief, if any December 17, 1984.

Based upon the foregoing brief schedule, the clerk shall include this

case in the pool of cases that are available for selection on this Court's February, 1985 calendar.

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ [not legible]
Deputy Clerk